

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 23 of 1982

with Cross Objections.

Date of decision: 29-6-98

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NARAYANBHAI MUGATRAM BHATT

Versus

KADIA JOSHI & CO.

Appearance:

Ms. Nandini Joshi for Petitioner

MR PV NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 29/06/98

ORAL JUDGEMENT

The respondent-plaintiff sued the appellant-defendant for recovery of Rs.19,207/-, towards the cost of construction made on the first floor of the defendant's premises. He issued bills for this amount to the defendant, but the defendant neglected to pay. Hence the suit was filed in the City Civil Court at Ahmedabad for recovery of the said amount. The defendant contested the suit by putting appearance in person. In the written statement he has taken defence that the agreement for construction of the first floor of the house was not entered into with the plaintiff, but with Hargovandas in his personal capacity. It has to be mentioned here that the plaintiff is a partnership firm. So plea has been taken that there was no privity of contract with the plaintiff firm. It has next been contended that Rs.14,000/- was the agreed price of the construction, by way of lump sum payment, and the bills which have been submitted for construction are in excess. The next plea which has been taken is that pending the work the defendant has paid Rs.6,000/- to said Hargovandas which is not given set off in the suit claim. Further defence has been taken that the defendant himself incurred expenditure of Rs.4,840/- for purchase of various building materials and doing building work and this amount has to be given set off in the suit claim. On the basis of the pleadings of the parties the learned trial court framed as many as seven issues in the suit which read as under:

1. Whether the plaintiff proves that it is a duly registered firm under the provisions of Indian Partnership Act ?
2. Whether the plaintiff proves that it has executed work to the extent of Rs.19,207/- for the building of the defendant, situated at Azad Society, Ahmedabad, as alleged ?
3. Whether the defendant proves that he has paid Rs.6,000/- to the plaintiff firm on or about 16-9-1976 ?
4. Whether the defendant proves that he has spent Rs.4,840/- for the construction work ?

5. Whether the defendant proves that a sum of Rs.1,160/- only is due and payable to the plaintiff, after settlement of the account, as alleged ?

6. Whether the defendant proves that plaintiff has not executed the work as per the terms of contract and therefore the plaintiff is not entitled to any amount as alleged ?

7. What order and decree ?

On these issues both the parties produced their respective evidence, and after considering the same the trial court has recorded the finding that the respondent plaintiff has proved that it has executed the work to the extent of Rs.19,207/- for the building of the appellant-defendant. The plea of the defendant that he had paid Rs.6,000/- to the plaintiff on or about 16-9-1976 has been accepted. Rest of the claim of the defendant was not accepted.

2. The appellant-defendant filed this appeal challenging the decree which has been granted in favour of the respondent-plaintiff for Rs.13,207/-. The respondent-plaintiff filed cross objections against the judgment of the trial court, whereby the payment of Rs.6,000/- alleged to have been made by the defendant has been accepted.

3. The learned counsel for the appellant- defendant has raised the only contention that the agreed cost of construction by way of lump sum was Rs.14,000/- and as such the bills of the plaintiff which were submitted for the construction work have illegally been accepted. Learned counsel for the respondent- plaintiff on the other hand contended that there was no agreement for lump sum cost of construction. The trial court, after appreciating evidence of both the parties has rightly held that no such agreement was there between the parties. The trial court has not committed any error in accepting the bill of cost of construction as submitted by the plaintiff to the defendant. It has next been contended that trial court has committed serious error in accepting the plea of the defendant about payment of Rs.6,000/- towards cost of construction of the first floor of the house of the defendant. The learned counsel for the appellant-defendant has contended that the trial court has not committed any error in accepting the plea of the defendant about payment of Rs.6,000/- to the

plaintiff.

4. I have given my thoughtful consideration to the submission to the submissions made by the learned counsel for the parties. From the three letters of the appellant- defendant at Exh.29 to 30 dated 27-2-77, 2-4-97 and 12-4-97 it is clearly borne out that the respondent plaintiff was suggesting the price of construction - once Rs.12,000/-, next time Rs.14,000/and the third time Rs.16,000/-. These three prices suggested by the plaintiff is clearly suggestive of the fact that the parties at the initial stage of communication (orally) had not arrived at any definite lump sum figure, and more particularly of sum of Rs.12,000/- as contended by the defendant in the written statement for the value of construction work to be carried out by the plaintiff for the defendant.

5. The trial court has rightly accepted that the tenor of the aforesaid three letters of the defendant will positively lead one to only one conclusion that the respondent0-plaintiff was trying to give to the defendant the assessment or estimation of the value of the work. Even if one accepts for a moment that the said assessment / estimation was ranging from Rs.12,000 to Rs.16,000, in the present set of evidence, and more particularly the defendant's own evidence in the form of letters, the learned trial court has rightly negatived the defence of the defendant that the plaintiff had agreed to carry out the construction work in question for a lump sum of Rs.12,000/-. The plaintiff sent running bill Exh.33 in which the value of construction was shown as Rs.19,207/-. The same value has been mentioned by the plaintiff in the final bill at Exh.39. Both the bills give details of the work, i.e. nature of the work, giving itemwise quantity, rate and value of each item and lastly the total amount. In the written statement the defendant failed to show that the rates charged by the plaintiff for the work done by him for the defendant are higher than the market rate or otherwise unreasonable. Similarly, he further failed to show that the bill is for larger quantity than the actual work done. If we go by his defence in the form of documents or oral testimony, his complaint is in general and very vague terms that the quality of the work is not satisfactory. His complaint is not that the rate is higher or excessive or that the billing was for larger quantity of work than actually carried out by the plaintiff, but there was an agreement for lump sum payment of the construction work done by the plaintiff of the defendant's house in the first and second floor. In the present set of evidence - documentary as well as oral

- the trial court has not committed any error in holding that there was no agreement for lump sum payment towards the cost of construction, and secondly the bill submitted by the plaintiff is not at excessive rate for any item, higher in quantity than the work done by the plaintiff for the defendant.

6. Now I may take up the cross objections of the respondent-plaintiff. The trial court has rightly observed that on the issue of payment of Rs.6,000/towards cost of construction by the defendant there is word against word. So the trial court had to consider whether the evidence of the plaintiff or the evidence of the defendant deserved acceptance. The plaintiff has come up with total denial of payment of Rs.6,000/-. In support of this denial he produced his account books suggesting that there is no entry of credit of Rs.6,000/- in the account books. Defendant's evidence has been there on the record, that on 14th December, 1976 he withdrew a sum of Rs.5,000/- from the bank. This fact has been proved by him by producing his pass book of savings bank account with Bank of India at Exh.18 of the list mark 32. The defendant further stated that he had to go earlier in the day for his service. He handed over the money to his wife. Wife of the defendant has also been examined at Exh.65. She made statement that at the level of construction of the terrace the plaintiff demanded Rs.6,000/- and she paid Rs.6,000/- to Hasmukhbhai on 16th at about 12.00 noon in the presence of her mother-in-law and katcha receipt has also been issued by Hasmukhbhai. The trial court has not relied upon only the oral statement, but has taken into consideration the circumstances which tilt the probabilities in favour of the defendant on this issue. The trial court has referred to the three letters of the defendant at Exh.28, 29 and 30. In the letter Exh.28 dated 27th February, 1977 there is clear mention of the payment of Rs.6,000/to the plaintiff. In the agreement Exh.29 also there is reference to payment of Rs.6,000/- and this also is the position in Exh.30. In all these three letters though very specifically the defendant has stated about the payment of Rs.6,000/- to the plaintiff on a particular day, still the plaintiff has not controverted those averments. In the presence of these evidence the trial court has not committed any error in holding that Rs.6,000/- has been paid by the defendant to the plaintiff and that amount has not been given set off by the plaintiff in the final bill sent to the defendant.

7. In the result both the first appeal and the cross objections fail and the same are dismissed. The parties

shall bear their own cost of the litigation.

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